SUPREME COURT OF THE UNITED STATES.

October Term, 1922

No. 68

SNAKE CREEK MINING AND TUNNEL COMPANY, a corporation,
PETITIONER,

vs.

MIDWAY IRRIGATION COMPANY, a corporation, and WILFORD VAN WAGONEN, RESPONDENTS.

ON CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENTS.

A. B. IRVINE,
Solicitor for Respondents.

SAM D. THURMAN,
Of Counsel.

SUBJECT INDEX

List of Cases

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Petitioner's latest contribution to the case at bar is denominated a "Supplemental Brief." It purports to be a discussion of the case of *Horne v. Utah Oil Refining Company*, 202 Pac. 815, recently decided by the Utah Supreme Court. It would be a travesty of truth to characterize the brief as a frank, ingenuous discussion of the case. On the contrary it seems to be a medley of conflicting ideas,—a jumble of paradoxes and incongruities. Counsel for petitioner treat the *Horne* case with the same degree of studied unfairness that characterized their discussion of other Utah cases in their former briefs. We feel we are not doing them injustice if we positively assert that up to the present time in the discussion of this case counsel have failed

to give any Utah case referred to a serious, careful and candid consideration with the view of ascertaining the exact point decided by the court. This is a bold assertion and one that ought not to be made unless the record itself conclusively establishes the fact. We appeal to the record for our justification.

In their discussion of the *Horne* case the following incongruities appear, to say nothing of resorting to unfair and misleading methods of interpretation: They first attempt, as they did in their criticism of the *Stookey-Green* case, to impeach the integrity of the decision because the opinion was written by Mr. Justice Thurman, one of counsel for respondent in the court below in the first trial of the case. Notwithstanding this attempted impeachment they strenuously insist that the case upholds their theories and supports their contention. We next find them contending that the case has no application whatever to the case at bar. Finally it us urged that the case should not be considered by this court at all because the decision was rendered since the writ of certiorari in this case was issued.

These apparent incongruities suggest the following inquiries: (a) If the *Horne* case supports their contention why seek to impeach its integrity by a veiled suggestion that the justice who wrote the opinion was biased in favor of Respondent; (b) if the case supports their contention why seek to undermine and destroy that support by contending that the case has no application to the case at bar? (c) If the case supports their conten-

tion why plead with this court to entirely disregard it because it is a recent case?

It occurs to us that a frank and truthful answer to each of these questions will disclose, once for all, the disingenuousness of petitioner's supplemental brief.

Respondent did not inject the *Horne* case into this discussion. We did not even seek to terrify counsel by threatening to use the case. They have cited and pretended to review the case of their own volition and have endeavored to treat it as a "straw man" for the sole purpose of knocking it down. But "it will not down." No amount of shifting and dodging from one position to another directly opposite, in respect to the case, will destroy its effect, and no amount of garbling or unfair interpretation will mislead this court as to the real scope and meaning of the decision.

Respondents do not contend that the case is on all fours with the case at bar. We do contend, however, that it utterly disregards the doctrine of the common law relating to percolating water. The defendants and appellants in the *Horne* case made their defense solely and exclusively on the identical ground upon which petitioner now stands; they took their position and made their last stand behind *what they contended* were the impregnable bulwarks of the common law relating to percolating water. They failed in the court below. They failed in the Supreme Court of the state, and notwithstanding this record, which is unimpeached and unimpeachable, counsel for petitioner, in the instant case, now contend before Your Honors with apparent seriousness

and candor that the decision in the *Horne* case upholds the doctrine of the common law relating to percolating waters. If the task were within the compass of human ability we would be inclined to make every possible effort to find some sort of an excuse for the unsupported contention of our brothers on the other side, but the task is insuperable;—we are compelled to abandon the attempt.

If the *Horne* case were the only Utah case in which counsel for petitioner had apparently overlooked the real point decided by the court we might be inclined to review the entire decision with the view of trying to correct their mental obliquity and set them right, but the same disregard of the actual points involved is more manifest, if possible, in other cases decided by the court. Take for instance their treatment of the case of *Crescent Mining Co. v. Silver King Mining Co.*, cited and relied on by petitioner in its original brief. In its supplemental brief, at page 7, counsel quote from the opinion in the *Horne* case certain language used by the court after referring to the *Crescent-King* case and other Utah cases. The language quoted appears on page 818 (202 Pac.) and reads as follows:

> "It must be conceded that as applied to the special facts in each of the cases cited, the proposition advanced by defendant finds ample support. In fact '*Cujus est solum ejus est usque ad infernos,*' or 'He who owns the soil owns to the lowest depth below,' is a maximum of the common law almost coeval with its very beginning.
>
> "Three decisions of this court are cited in the above mentioned cases. Neither of them has

> any bearing upon the question presented here. In the case of Crescent Min. Co. v. Silver King Min. Co., supra, it was held that the owner of the land in which water is found in a percolating state is the owner of the water, and can apply it to his own use whenever he wishes—a doctrine which, under the facts of that case, is incontrovertible, and no attempt has ever been made to controvert it in any subsequent case."

Immediately following the above quotation counsel make the following astounding declaration:

> "The foregoing announcement of the Supreme Court of Utah respecting the doctrine laid down in Crescent Mining Company v. Silver King Mining Company (a case exactly like the case at bar), is but a reaffirmance by the Supreme Court of Utah of the common law doctrine of percolating waters and conclusively demonstrates the soundness of our argument at pages 12 to 21 of our original brief to the effect that the Circuit Court of Appeals misconstrued and misapplied the decisions of the Supreme Court of Utah when it held that the common law rule has been overruled by the Supreme Court of Utah in its later decisions."

The sole purpose of our making the above quotations, one from the opinion in the *Horne* case and the other from counsel's brief, is to call attention to the positive assertion of petitioner's counsel that the case of the *Crescent Mining Co. v. Silver King Mining Co.*, is *"a case exactly like the case at bar."* Is that a frank, ingenuous statement of a solemn fact? Is the *Crescent-King* case exactly like the case at bar? If so we humbly apologize to the court for every argument we have hitherto made in the discussion of the case. The *Cres-*

cent-King case is not exactly, or at all, like the case at bar. It is as different from it as night is from day, and counsel for petitioner are either wittingly or unwittingly trying to mislead the court, and that too on a point of vital importance; nor is there anything whatever in the language quoted from the *Horne* case to justify counsel's erroneous interpretation. The difference between the two cases is so plain and unambiguous that fair-minded, reasonable men, without conscious effort, should be able to comprehend it at a glance. We thought we had clearly expiained it in our original brief. It seems our efforts were futile. We will make one more attempt. Briefly stated, the difference is this:

K, a mining company, owns a parcel of land containing underground percolating water. This land is not subject to a prior water right in any one else because no such prior right exists. K drives a tunnel into this land and collects the water together so that it forms a stream. After the water flows from the tunnel and away from K's land, C, a mining company, commences to use it and subsequently claims it as a vested right and seeks to enjoin K from interfering with the flow. In other words, C, for its own exclusive benefit in effect claims a perpetual easement in K's land. That was the Crescent-King case. The Utah Supreme Court held that C was not entitled to the water and denied its application for relief. Now, as to the instant case:

S, a mining company, owns a parcel of land containing underground percolating water. This land *is subject to a prior water right appropriated by M*, an irri-

gation company, under the Act of Congress of 1866, when the land of S was a part of the government domain. M's appropriation was also recognized by the local laws and customs existing in the community where the land and water were situated. S's patent to the land was long subsequent to the appropriation of the water by M. More than a quarter of a century after the date of M's appropriation S drives a tunnel into its land for the purpose of developing ore and affording a means of transportation. It encounters the percolating water contained therein, collects it together in a stream, causes it to flow out of the mouth of its tunnel and back into the adjacent stream from which M had made its appropriation. S purposes conveying the water to a distant section of the country and there devote it to commercial purposes making merchandise of it for its own use and benefit. It institutes an action against M to quiet its title. That is the case before this court.

To contend that this case and the *Crescent-King* case are exactly alike is to imply that the party who makes the contention is either attempting to mislead the court or is hopelessly incapable of comprehending a plain statement of facts.

After the above explanation of the real meaning and effect of the *Crescent-King* case we take the liberty of reiterating with emphasis what the court said in the *Horne* case, which language counsel attempts to twist into a recognition of the doctrine for which they contend. We read from page 7, of their supplemental brief:

> "In the case of the Crescent Min. Co. v. Silver King Min. Co., supra, it was held that the owner of the land in which water is found in a percolating state is the owner of the water, and can apply it to his own use whenever he wishes—*a doctrine which, under the facts of that case,* is incontrovertible, and no attempt has ever been made to controvert it in any subsequent case." (Italics ours.)

It would seem that further comment concerning the *Crescent-King* case and the reference thereto by Mr. Justice Thurman in the *Horne* case would be a useless multiplication of words.

Viewed in the light of our analysis of the positions assumed by petitioner's counsel in respect to the Utah cases referred to it is not surprising that counsel on page 5 of their supplemental brief find it difficult to follow the reasoning of Mr. Justice Thurman in *Horne v. Utah Oil Refining Company.* No one can follow the reasoning of Mr. Justice Thurman in the case referred to and at the same time undertake to pursue a devious path. If eminent counsel on the other side who are possessed of more than ordinary intelligence will make a conscientious endeavor to understand the real scope and meaning of the decision in the *Horne* case and the other Utah cases bearing upon this question, instead of seeking for some isolated sentence or expression from which to extract a modicum of comfort, they will find no difficulty in following the reasoning of the court.

Counsel have treated the *Horne* case and the *Crescent-King* case with the same type of unfairness as they

treated the *Sullivan* case and *Stookey-Green* case. In the *Sullivan* case they quoted with scrupulous exactness the obiter dictum of the court while passing unnoticed the actual law of the case.

The best illustration, however, of counsel's unfairness in dealing with the Utah cases is found in their reply brief at pages 18 and 19. In order to exemplify a pretended belief that Mr. Justice Thurman had assumed a different attitude on the bench in respect to the law of percolating water, from that assumed by him while acting as counsel for respondent in the first trial of the instant case, they quote the following from the *Stookey-Green* case at page 588 (178 Pac.):

> "If it is private land and the water is percolating, as known and understood at the common law, then it is not the subject of appropriation as against the owner of the land."

This excerpt, standing alone, unqualifiedly supports counsel's contention and of course was quoted by them for that identical purpose; but how does the matter stand if the same excerpt is quoted in connection with the sentence which immediately precedes it? We will quote both sentences in order that the court may be fully enlightened, italicizing the sentence relied on by counsel:

> "The concrete doctrine of these cases, when reduced to the last analysis, is, if the land from which the water is taken is public domain, the water is subject to appropriation whether it is percolating water or water flowing in well-defined channels either above or under the surface. *If it is private land and the water is percolating, as shown and understood at the common law,*

then it is not the subject of appropriation as against the owner of the land." (Italics ours.)

"The fool hath said in his heart *there is no God.*"

By omitting the first seven words of the above quotation and quoting the remainder, the most sublime and solemn truth of the Bible is nullified and set at naught.

Instances might be multiplied in which the Utah cases bearing upon this question have been subjected to unfair treatment by counsel on the other side, but after all this honorable court, in view of the contention made, will undoubtedly read the cases and form its own conclusion as to what the court decided. No matter what the court may have said in any particular case, the vital questions are, What were the issues involved and what was the decision of the court? If this test is applied respondent will be content.

In the *Stowell-Johnson* case, 7 Utah 215, the issue was between one claiming a reparian rights under the common law and one claiming under the law of appropriation. The court sustained the latter as against the former.

In the *Sullivan case,* 11 Utah 438, the issue was between one claiming a right to water percolating in his own land as against one claiming as a prior appropriator under the law appropriation. The court rendered judgment in favor of the prior appropriator.

In the *Rasmussen* case, 189 Pac. 572, the issue was between a land owner under the common law a right to the water percolating in his land as against another claiming as a prior appropriator under the law of appro-

priation. The case was decided in favor of the prior appropriator.

These cases were all decided by a unanimous court against the doctrine of the common law and in favor of the prior appropriator under the law of appropriation.

In the *Crescent-King* case, 17 Utah 444, as hereinbefore shown, the right of a prior appropriator as against a common law right was not involved.

In the *Willow Creek* case, 21 Utah 248, the court held that an appropriation could not be made from water which arose upon the land of another *after the owner obtained her patent.*

In the *Garns-Rollins* case the court held in effect that waste water from irrigation escaping from the land of another was not the subject of a vested or prescriptive right as against the owner of the land.

The *Roberts-Gribble* case, 43 Utah 411, was expressly decided upon the authority of the *Garns-Rollins* case and so limited subsequently in the *Stookey-Green* case and the *Rasmussen* case.

The *Herriman* case, 25 Utah 96, somewhat similar in its facts to the case at bar is subjected to the following just and proper criticisms in *Horne vs. Utah Oil Refining Company,* supra, at page 819 of the report:

> "The case is unsatisfactory as an authoritative decision for several reasons: (1) It was rendered by a divided court, each of the three justices delivering a separate opinion disagreeing in essential particulars; (2) in the main it was decided upon a question of fact partially sustaining a finding of the trial court to the effect that the driving of defendant's tunnel did not inter-

fere with the water to which plaintiff was entitled; (3) it does not appear that the real basis of plaintiff's right to the water by prior appropriation, namely, the laws of Congress, or of the State, authorizing appropriation, or authorities in support thereof, were presented to, or considered by the court. On the other hand, it does appear that the common-law doctrine relied on by defendants was ably presented by defendants' counsel, and also considered by the court. In any event, the doctrine enunciated in that case, in so far as it appears to support the common-law rule relating to percolating waters relied on by appellant in the instant case, has been seriously discredited, if not overruled, by this court in more recent decisions. Rasmussen v. Moroni Irri. Co., 189 Pac. 572; Mountain Lake Min. Co. v. Midway Irr. Co. et al., 47 Utah, 371, 154 Pac. 584; Bastian v. Nebeker, 49 Utah, 390 163 Pac. 1092; Peterson v. Lund, 193 Pac. 1087; and Stookey v. Green, supra. It cannot be denied that the decided trend of the decisions of this court in recent years has been to reaffirm the doctrine enunciated in the earlier case—Stowell v. Johnson and Sullivan v. Min. Co., supra—which, in effect, hold that the common-law doctrine, both as to riparian rights and percolating water, are inapplicable to conditions existing in this jurisdiction, and cannot prevail as against a right acquired by prior appropriation."

In Mountain Lake Mining Company vs. Midway Irrigation Co. 47 Utah 346, the physical facts were almost identical with the case at bar. The plaintiff mining company was represented by two of the most able and efficient irrigation lawyers in the State of Utah, Hon. A. C. Hatch and Hon. E. E. Corfman, the latter now Chief Justice of the Utah Supreme Court. These eminent attorneys being well acquainted with the

facts of their case and the laws of the state relating to water rights both under the common-law and by appropriation, in drafting their complaint properly assumed that the plaintiff had no right to water percolating in its land unless it was water that had not theretofore been appropriated by others. Proceeding upon that theory they sued only for such new and unappropriated water as might be developed in the tunnel driven by the plaintiff. The same was true in Bastian vs. Nebeker, 49 Utah 390, decided at a subsequent term of the court.

We have heretofore cited these cases in support of our contention concerning the burden of proof and refer to them in this connection while considering the Utah cases as whole.

We have already considered the *Horne* case, which is the most recent case cited by the court. It is the first and only case involving a claim of right under the common law as against a right under the "American rule" or doctrine of reasonable use. In that respect, and that only, it is sui generis. In every other respect it is in harmony with practically all the other cases in that it utterly disregards the common law right to an owner of land to take and use the water therein if it interferes with the right of another.

The foregoing are all the Utah cases upon which the parties litigant rely. Notwithstanding the holdings of the court, as shown in the brief review we have made, counsel for petitioner, in their supplemental brief, invoke the "Rule of property" doctrine and make their

last stand upon that proposition. With far better reason for doing so, well might we say, as did the California Supreme Court in *Katz. v. Walkinshaw*, 74 Pac. at p. 771, after reviewing previous cases decided by that court:

> "In view of this conflicting and uncertain condition of the authorities, it cannot be successfully claimed that the doctrine of absolute ownership is well established in this state. * * * We do not see how the doctrine contended for by defendant could ever become a rule of property of any value."

Just before entering their discussion of the rule of property doctrine which is the last subject discussed in their supplemental brief, counsel make the statement that no statute authorizing appropriation was adopted in Utah prior to 1888, and then it extended only to surface waters. This is an astounding statement to make in view of the decision in the Sullivan case, in which the court construed the statutes then existing and as against the very contention which counsel now make distinctly held that the statute authorized the appropriation of water whether underground or above the surface. In this connection we also feel abundantly authorized to say that the Sullivan case was the first Utah case in which the Utah and Federal statutes were construed involving a common law right to percolating water by the owner of the land in which it was found as against a right by prior appropriation under the statutes. If the contention which counsel now make is correct we submit the following question for their deli-

berate consideration: *Why was Sullivan's right by appropriation upheld and sustained while the Mining Company's claim under the common law was denied?* The issues involved were clear cut. Is there any doubt as to how the Utah court decided the case?

We make the further statement, which, in our view of the case is exceedingly important, that in no subsequent Utah case have the statutes referred to been construed by the court *where such construction was necessary to a decision of the case.*

Before concluding this argument, we desire to direct the court's attention to the shifting attitude of counsel for petitioner.

In the court below counsel made their stand on two propositions. First, that on the facts of the case they are entitled to the water in dispute. Second, that the supreme court of Utah had, by an unbroken line of decisions, adopted the common law rule as to percolating water.

As to the first propositon the trial court held that they had failed to sustain the burden of proof as they are required to do under the decision of the Utah court in the case of *Mountain Lake Mining Company vs. Midway Irrigation Company,* 47 U. 346, the trial court expressly approving that decision. The language of the trial judge in the instant case which is to be found in the concluding paragraph of the court's opinion (see Tr. P. 33) is as follows:

> "*Upon the whole case* I am of the opinion that the plaintiff has failed to sustain the bur-

> den of proof upon its claim that the water included in its tunnel or any definite part or portion thereof was new or developed water." (Italics ours)

The Circuit Court of Appeals went even further than the trial court and affirmatively found the facts in favor of respondent herein, and against the petitioner. We quote from the opinion: (Tr. P. 381.)

> "Adopting this rule" (the rule laid down in the Mountain Lake case, supra, which had been quoted and followed by the trial court) "it evidently warrants findings, and we so find, that since the construction of the tunnel, by the plaintiff, the water in Snake Creek has been materially lessened to an extent that there is not sufficient water in the creek to enable the stockholders of the defendant (respondent herein) to irrigate their lands, which are all agricultural, unless permitted to use the surplus water flowing into the creek from plaintiff's tunnel."

It is, perhaps, because it is true that both the trial court and the Circuit Court of Appeals found against them on the facts that, in this court, counsel content themselves with a bare mention of the facts, inserting on page 73 of their brief three detached quotations from the opinion of the trial court on isolated portions of the evidence. But they carefully refrain from quoting or even referring to the language used by the trial court quoted above summing up his conclusions *on the facts as a whole.* In view of this record, we have contented ourselves with the brief reference to the facts that will be found on pages 64-70 of our brief. Should this court desire a more extended discussion of the facts for any

purpose, we respectfully refer to our reply brief filed in the Circuit Court of Appeals (Pages 6-37) which we assume will be part of the records filed in this court. However, by reason of counsel's failure to discuss the facts in its briefs in this court, we felt at liberty to assume it would be unnecessary for us to present any extended discussion of that matter at this time.

In the court below counsel contended that the Utah decisions presented "an unbroken line of authorities" adopting common law rule as to percolating water. As we pointed out there, and as we endeavored to point out here, counsel is wholly mistaken in this assumption. The Circuit Court of Appeals agreed with our contention holding that the effect of the Utah decisions was a repudiation of the common law rule.

Now, shifting their position, for the first time of all the history of this litigation counsel have advanced the fanciful theory that in Utah there are two lines of decisions relating to percolating water, one relating to water "*artificially*" produced and the other relating to percolating water naturally found in the land. The former they denominate "river system cases" making use of an expression used in one of the Utah opinions. Then because we have not written a volume discussing these alleged two lines of decisions containing alleged distinctions, for the first time discovered by counsel, the question is asked: "Why have we made no attempt to explain the distinctions between these alleged two lines of cases?" The answer is, we have referred to

the cases discussed and have pointed out the *real* as opposed to the *imaginary* questions decided. The "distinctions" exist only in the mind of counsel.

The first Utah case (Sullivan Case, 11 U. 438) dealt with water percolating naturally in the soil and no question of percolating "artificially" produced was involved. And, as we have seen, the Utah court awarded the water to the prior appropriator as against the owner of the land claiming under the common law doctrine. The latest case decided by the Supreme Court of Utah involving this question (*Utah Oil Refining Co. vs. Horne 202 Pac. 815*) dealt *solely with percolating water naturally found in the soil.* There was no question of "artificial percolating water produced by irrigation," and, if the common law rule prevailed in Utah, then the defendant in that case was entitled to the water found in his land. The defendant in that case vigorously contended for the adoption of the Common Law Rule, and all of the Utah cases involving the subject were discussed fully by counsel, in briefs as well as in oral argument, and are referred to, analyzed and explained in the opinion of the court. Surely counsel will not have the temerity to claim that this was percolating water "artificially produced," because there is not a single word either in the facts or in the opinion that would justify such a claim.

The court quotes from, discusses and approves the American cases which have adopted the American rule, as contended for the respondent herein, as rejects the common law rule. The court says:

"The concensus of opinion among the authori-

ties seems to be that the doctrine of correlative rights or reasonable use of percolating water includes the idea that the water can not be conveyed away either for waste or use from the land in which the water is found in its natural state." (202 Pac. 824.)

"The best considered modern authorities seem to be overwhelmingly in favor of the doctrine of correlative rights in cases of this kind." (same page)

And on page 819 the court after discussing the Utah cases says:

"It cannot be denied that the decided trend of the decisions of this court in recent years has been to *reaffirm* the doctrine enunciated in the earlier cases—(Stowell vs. Johnson and Sullivan vs. Mining Company supra—*which, in effect hold that the common law doctrines both as to riparian rights and percolating water are inapplicable to conditions existing in this jurisdiction and cannot prevail as against a right acquired by prior appropriation.* (Italics ours.)

So, also it will be seen upon examination of the cases which counsel claim draw a distinction between percolating water "artificially" produced and percolating water naturally in the soil, that, while in some instances those cases deal with percolating water "artificially" produced, they laid down a rule applicable to *all percolating water.* For example, in the case of *Rasmussen vs. Moroni Irrigation Company,* 189 Pac. 572, a case relied upon by counsel as indicating that there are two distinct lines of decisions, Mr. Justice Frick, in writing the opinion, adopts and applies to that case the principle we heretofore quoted from 2 Kinney on Irrigation, Secs. 1193 and 1194, and expressly grounds

the case on the broad principles laid down by Mr. Kinney. (See Page 577). Just preceding his quotation from Mr. Kinney, Mr. Justice Frick describes the conditions prevailing in the intermountain country which require the application of the American rule as opposed to the common law rule. We reproduce the exact language of the court from page 577, as follows:

> "It must be remembered that in this mountainous country, all streams are necessarily, to some extent at least, fed from underground sources as well as from surface sources. Indeed, the water which flows in the middle and lower reaches of our mountain streams from which the water is diverted for irrigation and domestic uses after the high-water season is passed, and when we have arrived at what is called the low-water stage, nearly all reaches those streams through underground and invisible channels. The porous and gravelly nature of the soil of our mountains, foothills, and even the higher bench lands, tends to freely absorb the water that comes from the melting snows in the spring and thus seepage and percolating waters form a not inconsiderable part of the supply of all of our irrigating streams. *When therefore all of the water is appropriated by a prior appropriator which flows in a given stream at some point some distance down said stream, such appropriator acquires a right to all of the sources of supply of such stream whether visible or invisible, or whether underneath or on the surface.* The porous and gravelly condition of our mountains and higher bench lands, as well as the more elevated irrigated lands, thus retard the flow of the water into the mountain streams. By that means much water is conserved for irrigation and other uses for the latter part of the irrigation season which, if it flowed directly into the streams as

> the spring sun melts the snows, would be entirely lost and wasted. These mountains and highlands thus act as natural reservoirs and in a measure accomplish what would be accomplished by artificial storage of water. The first appropriator on the stream, however, acquires a prior right to the use of all those waters, and no subsequent appropriator may interfere either directly or indirectly with the rights of the prior appropriator. If, however, the appellant may cut off one of the sources of supply of Sanpitch river, any other landowner and water user may cut off another source of supply, and so on until all the sources of supply which pass underneath the surface of the soil are cut off, and thus the lower and prior appropriator would be left without any, or at least only a meager, supply of water in the low-water season. *This may not legally be done.* (Italics ours.)

It will thus be seen that the principle upon which the decision rests was not the narrow limitation sought to be applied by counsel for petitioner but that it broadly included, not only percolating water "artificially" produced, but all water stored in the hills, as Mr. Justice Frick says: "Whether visible or invisible or whether underneath or on the surface." He first lays down the broad general rule applicable to all percolating water and states what the law is and then, in concluding his opinion, he applies the law so stated to the facts and conditions existing in the particular case.

All such water percolating from the bosom of the mountains "whether visible or invisible" is characterized by the Utah court as a part of the stream, indeed, it is the very "source of the stream" after the spring run-off caused by the melting snows, and, as stated by

Mr. Justice Frick, all of this water belongs to the prior appropriators, And, as he very forcibly states, if one person is permitted to go higher up on the stream and cut one source of supply, any other land owner could cut out other sources of supply and so until all of the sources of supply are cut off. But as the Supreme Court of Utah says so emphatically in that case: *"This may not legally be done."*

Finally as if to clear up any doubt as to the fundamental principle intended to be enunciated by the Court, Mr. Justice Frick, on page 578, says:

> "The fact that the water in question may be percolating or seepage, as contradistinguished from water flowing in known and defined underground channels, *does not alter the case.* The controlling question always is: "Was the water in question appropriated and put to a beneficial use by others before the interception and attempted appropriation thereof by the landowner?"

Respectfully submitted,

A. B. IRVINE,
Solicitor for Respondent.

SAM. D. THURMAN,
Of Counsel.

Service of the foregoing is hereby acknowledged, and copies received, this 7th day of October, 1922.

H. R. McMILLAN,
Solicitor for Petitioner.